UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

KENNETH WRIGHT, on his own behalf and on behalf of other similarly situated persons,	)	
Plaintiff,	)	No. 2:14-cv-00421
vs.	)	Seattle, WA
LYFT, INC., a Delaware corporation,	)	
Defendant.	)	Motion Hearing December 16, 2014

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE CHIEF JUDGE MARSHA J. PECHMAN
UNITED STATES DISTRICT COURT

APPEARANCES:

FOR THE PLAINTIFF: DONALD W. HEYRICH
HKM Employment Attorneys PLLC
600 Stewart Street, Suite 901
Seattle, WA 98101
dheyrich@hkm.com

JASON A. RITTEREISER
HKM Employment Attorneys PLLC
600 Stewart Street, Suite 901
Seattle, WA 98101
jrittereiser@hkm.com

FOR THE DEFENDANT: CHELSEA LYN MAM
Gordon Tilden Thomas & Cordell LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
cmam@gordontilden.com

BRADLEY S. KELLER
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
bkeller@byrneskeller.com

Andrea Ramirez, CRR, RPR
Official Court Reporter
United States District Court
Western District of Washington
700 Stewart Street, Suite 17205
Seattle, WA 98101
andrea_ramirez@wawd.uscourts.gov

Reported by stenotype, transcribed by computer

THE CLERK: This is the matter of Kenneth Wright vs. Lyft, Cause Number C14-421.

Counsel, please make your appearance.

MR. HEYRICH: May it please the Court, Donald Heyrich, for plaintiff, and with me is Jason Rittereiser from my firm.

THE COURT: Good afternoon.

MR. KELLER: Good afternoon, Your Honor. Brad Keller, on behalf of defendant Lyft. And with me also is Chelsea Mam.

THE COURT: Good afternoon.

Well, Counsel, I've had an opportunity to read your paperwork, and you should have received a series of questions from me yesterday. I'd like to have you respond to those sometime during the course of your arguments.

It's my understanding that you've been given 20 minutes per side; is that correct?

MR. KELLER: Correct.

THE COURT: All right. Then let's begin.

MR. KELLER: Thank you, Your Honor. Brad Keller, on behalf of Lyft. And I'm going to dive right into this.

The Court posed what is the 64-dollar question regarding the TCPA claim. I'm going to address the federal TCPA claim, and Ms. Mam is going to address the state law claims. I'm going to throw around a bunch of acronyms here. I'm going to

feel like I'm in the Army again, I think.

As I waded through the multiple conflicting district court decisions addressing exactly the issue you posed, what is the definition, it reminded me a little bit of a very time-worn joke about accountants: How much is one and one? And the answer being: What do you want it to be? Because you can find the district court decision to justify a definition of an automated telephone dialing system to justify the outcome that Lyft is asking you to reach in this case, or to justify the definition that the plaintiffs ask for.

The parties are advocating, essentially, two different interpretations -- or excuse me -- two different definitions. And perhaps predictably, under Lyft's definition, we should win this motion under the TCPA. Under plaintiff's proffered definition, Lyft contends it should also win. But it is admittedly a closer call in the context of the Rule 12 motion.

The two definitions I've handed up -- I asked the clerk to hand up to you a handout. And if you have that in front of you, it's got the two definitions that the parties are proposing. I'm not going to read them. The difference between the two of them is essentially whether or not a required feature is automated, random, or sequential dialing. That's exactly what the statute says. That's what we're advocating. And that is what you will not find in the definition of -- that the FCC came up with in the context of a predictive dialer.

There's really a handful of district court cases that we would urge you to consider for guidance in this issue. One is the *Dominguez vs. Yahoo* case, out of the Eastern District of Pennsylvania, decided in March of this year, where the Court rejected the FCC's interpretation and conducted a *Chevron* analysis to basically say, the statute is unambiguous. It has a definition and includes an automated random or sequential dialer, end of story.

Also, the *Marks vs. Crunch San Diego* case, which was from October of this year, from the Southern District of California, Judge Cynthia Bashant. She also rejected the FCC's effort to rewrite the statute and said: Even if I did consider that to be binding, under Hobbs Act issues, I find that the FCC was dealing with predictive dialers. It wasn't dealing with the issue confronted in the TCPA claim.

On the other end of the spectrum is the very recent *Johnson vs. Yahoo* case from the Northern District of Illinois, decided last week, where, interestingly, the district court judge there agreed that the FCC interpretation was off the reservation. It wasn't grounded in the statute at all; and if the Court was going to go that route, that it would say it conflicts with it. But that court, which sits in the Seventh Circuit, felt it was bound under a Seventh Circuit decision, such that the Hobbs Act precluded it from in effect rejecting what was an unauthorized FCC interpretation.

And the last case I'd urge you to take a quick look at is another case from the Northern District of California decided last month, *Nunes vs. Twitter*. Because there is just a good summary of essentially the three -- the disparity in the arguments here. And although the Court denied the Rule 12 motion, it did so in that case because it basically held that Twitter hadn't really raised the issue in its briefs that the FCC was off the reservation and unauthorized to come up with its interpretation. They have raised it for the first time in argument and said, basically, come back and argue that at summary judgment time.

So why -- I should just briefly address for you why it is that the FCC rewrite of the statute should not be applied here. Probably the biggest reason is, the statute says what it says, and it's absolutely clear in the statutory definition. Random or sequential dialing is an element of an automated dialer.

Secondly, under a *Chevron* analysis, there is no basis for giving the FCC rewrite of the statute any deference whatsoever here.

And if you don't apply a *Chevron* analysis, the third reason is that the FCC rule-making proceeding back in 2003, that led to this contrary definition, was all about predictive dialers. And the Hobbs Act does not come into play, because we are not asking you to enjoin, or to set aside, or suspend, or invalidate any FCC ruling regarding predictive dialers.

THE COURT: Mr. Keller, you're arguing somewhat two ways. I mean, you're basically saying: Don't listen to the FCC. And then in the alternative, you want me to wait for the FCC to speak on this issue.

MR. KELLER: That's true. I am trying to cover this six ways -- both ways.

THE COURT: All right. You want belt and suspenders on it.

MR. KELLER: Well, I'm a realist. And I'm a realist in the sense that -- while there is an emerging -- I don't want to say emerging trend -- well, a number of very recent district court decisions have said: The FCC is entitled to no deference on this. If you apply a *Chevron* analysis, it's contrary to the statute. That's our primary argument. But I'm also a realist that there is a very unsettled body of law here, and there is a very unsettled issue; and that if I'm right, and that the predictive dialer issue is what they were grappling with, and the FCC is going to fix that in the next couple of months, it does make sense to give them that opportunity to do so.

THE COURT: Do you know where that -- those cases are with the FCC right now?

MR. KELLER: I do. And as with many things involving our federal agencies, it's less -- I wish I had more clarity.

Regarding the Glide Talk, the general rule is that these things take around 12 to 14 months from the closure of the

comment period. If the general rule applies, the Glide Talk decision should be coming out in the first three to four months of 2015. And if the general rule ends up applying in this case in the TextMe, we should have a decision from the FCC in mid-2015.

And both of those -- both of those things, they do tee up in front of the FCC, among other things, the issue of, does the equipment actually have to be doing the prohibited function of automated or random dialing, or is it enough that you could reprogram the software such that it could do it? It also tees up the whole issue of when you have this invite-a-friend issue that is so important in the Lyft application, is that considered the user making the call, or is that the application provider?

THE COURT: One of the questions that I'm going to ask your opponents -- and maybe I should give you a shot at answering it -- is, how is this any different than somebody saying: Hey, I saw that Macy's has a coupon for such-and-such, and you forward it on to your friend?

MR. KELLER: It's the same thing in terms of the user doing it. The scale can be different. And because I can send it on to -- that one coupon, I can only send it to one coupon. Here, I can send that coupon on to two or three or ten. And when this application was initially launched, I could send it to all of my contacts. That feature was disabled after a few

months, and it's no longer there. But for purposes of the motion to dismiss, we have to cover both scenarios.

We would say it's very similar. And that really is the alternative, in somewhat the alternative basis, is, regardless of whether the FCC definition is used or not, we say even if you use it, the degree of human intervention that's involved in how you use this app -- and I'm not going to go through them, but those are the rest of the pages in the handout that I provided -- is all of the multiple, user-taken individual steps that a human being has to take before an invitation goes out to your friend.

THE COURT: Let's assume, for purposes of argument, that I agree with you on your federal claim, and you don't have one. Should I reach the other two or send the plaintiffs back to state court?

MR. KELLER: I would always rather be in federal court in a consumer class action, even if it's under CEMA or under the CPA. I would have a personal preference of staying in federal court and having the claims addressed here, either in promotions or on the merits at trial. But I recognize that it is entirely discretionary with this court as to whether it wants to continue to exercise pending jurisdiction. And in a certain sense, I acknowledge that's a lot to ask. But that would be my ask.

Thank you, Your Honor.

THE COURT: I have one more question for you. And that is, I'm trying to understand what the damages would be here, you know, infinitesimal, if somebody gets a single text message. I mean, that must be less than a penny.

If there's no unit of measure, can there be damages? I know that the state supreme court has talked about you have damages under the CPA even if they're miniscule.

But under the federal statute, if you can't measure the damages, are you damaged? Or am I missing what the damage might be?

MR. KELLER: I think you're missing the debate. And I view myself to be an advocate and also to try and be an aid. And there would be a debate between the plaintiff and the defendant about whether there is any damage requirement at all under this statute. We will argue to you that there is and that it is not formulaic. My opponent will argue to you at a later -- if we ever get to that stage of the case -- that, no, there is no such requirement, it's automatic, formulaic, $500 per text, even if it's a million texts that got sent. That is a debate and an unanswered issue. As an advocate, I would be pushing what you were perhaps suggesting in your comment. But I have to acknowledge it's uncharted --

THE COURT: Thank you.

MR. KELLER: -- under the federal statute.

Ms. Mam is going to address the injury issue under the

state law.

THE COURT: Okay.

MS. MAM: Good afternoon, Your Honor. Chelsea Mam, on behalf of Lyft.

THE COURT: Good afternoon.

MS. MAM: I'm going to talk about why plaintiff's state law claims can and should be dismissed. Primarily, I'm going to focus on the commercial mailing -- or Commercial Electronic Mailing Act, or CEMA. And under that act, there are three primary issues why Lyft -- why plaintiff's claims should be dismissed.

First, the plain language of the statute does not grant plaintiff a private cause of action for damages. Second, plaintiff has not alleged the necessary injury to maintain a private cause of action for damages or injunctive relief. And third, even if the plaintiff could maintain a private cause of action despite the plain language of the statute, plaintiff has failed to allege a violation of CEMA, because the text message at issue here is not commercial.

Turning to that first issue of whether plaintiff can maintain a private cause of action for damages, we need only look at the plain language of the statute. Section 090, Subsection 1, says that a person can bring a private cause of action for any violation of this entire chapter and may seek injunctive or damage relief. However, the very next sentence

expressly limits damages relief to causes of action for a phishing scheme.

Phishing schemes are e-mails that are sent for the purpose of deceiving the recipient into providing personal information, and then turning around and using that for identity theft or other fraud. Plaintiff hasn't alleged, nor could he allege, a phishing scheme here. And therefore, he can't make a claim under CEMA for damages.

To address the Court's question on this issue of what "subsection" is referring to and means in this context, Lyft asserts that it should be read as any other statute, any other RCW. The chapter is CEMA itself. Then there's Section 090 and Subsection 1. And when Subsection 1 refers to "this subsection," it's referring to Section 1 of 090, not Section 080 or Subsection zero -- some subsection in 080 or 040, for example. The legislature knows how to make a private cause of action and did so here. And it also limited that cause of action for damages to phishing schemes, which plaintiff simply has not alleged.

Furthermore, plaintiff can't bring a CEMA action here because -- for damages or injunctive relief, because he hasn't asserted a sufficient injury. As the Court has pointed out here, there needs to be some sort of threshold injury to make a claim, and Section 090 requires that. It says: Any person who is injured can bring a private cause of action. But the

plaintiff hasn't been injured. There's de minimis, if any, injury here. It's like saying: I was standing in the lobby today and pressed the button for an elevator, and it didn't come for 15 seconds. That was so aggravating. I should be able to bring a claim against the people who made the elevator, or the building that I work in.

Similarly, the plaintiff says: I received a text message. It took about two seconds to process it, could delete it immediately, and now I should be able to claim damages and loss here. It just simply doesn't add up to an injury sufficient under CEMA.

Finally, even if the plaintiff could bring a CEMA claim, under the 090 private cause of action, he's failed to allege that there's been a violation of CEMA, because the text message is not commercial in nature.

THE COURT: Let me ask you a question about that.

MS. MAM: Okay.

THE COURT: What's the point of offering this up if it isn't to make money somehow or further their business? In other words, there's no point in doing any of this unless there's a commercial nature. They didn't do this to be nice.

So how is it not commercial?

MS. MAM: So I agree that the ultimate goal in the future is to bring in Lyft community members. But I think we need to do as the Court did in *Hickey vs. Voxernet* and limit

the analysis to this text message. This text message is not seeking an exchange of money between the plaintiff and Lyft. It's not seeking an immediate, right-now sale, as the Court has defined it.

THE COURT: So does "commercial" mean that there has to be an immediate -- an immediate exchange? Because companies all over the world give things away in the hopes that if you get somebody to try something, they will come back and be a patron.

MS. MAM: Sure. However, the statute has defined commercial as messages sent to promote goods or services for sale. And then as this court recognized, definition of sale is a price in money paid or promised. Here there's no money paid or promised except for a free giveaway, the second component of the statute. But it simply doesn't meet that immediate need for a sale in the text message. I think the distinction is potential future sales versus current sales. And I think that the Court recognized in *Hickey vs. Voxernet* that the logical way to view that is current -- what's the current text message proposing? Is it a current sale, or is it looking into the future and hoping for something?

THE COURT: So Congress didn't want to preclude people from getting free stuff --

MS. MAM: Exactly.

THE COURT: -- but they do want to stop them from

being solicited.

MS. MAM: Right. And just briefly, we want to reiterate that the CPA claim can be dismissed, because it's derivative of the CEMA claim. And since we assert that the CEMA claim fails, the CPA claim necessarily fails as well. Thank you.

THE COURT: Thank you.

MR. HEYRICH: Good afternoon again, Your Honor. Donald Heyrich for the plaintiff.

These issues are fascinating. It's our pleasure to be discussing them with you here today.

And I guess I'll address the Telephone Communication Protection Act first, which -- since that was the Court's first question. And the question is, how should the Court define ATDS. We submit that the Court should -- first of all, we have to recognize we're in a Rule 12 setting. Based on the facts that are alleged in the complaint, we're not aware of any case anywhere across America that said that these kinds of facts don't get past the Rule 12 threshold. Even Judge Lasnik, in the *Orange Cab* case, where on summary judgment, after experts had an ability to look at the information and the systems being used, and manuals were submitted and so forth, that's the point at which Judge Lasnik was able to make an informed decision. We, obviously, respectfully disagree with the decision that was reached, and we've preserved it for appeal.

But the *Crunch* case and the other case that was mentioned here today, they're all summary judgment cases. And it does seem to us that what's happening here a little bit is, all the inferences are being taken against the plaintiff when, in fact, in a Rule 12 setting here, we need to do just the opposite.

And there really are two answers to your question here. One is, we have a point of view as to this definition and how it should be read and applied. But notwithstanding that, we would submit that no matter how the Court defines automatic telephone dialing system, under any standard that's out there, even a narrow view of the statute, the only thing we need to do, at this point, is to point out that it is plausible that an automatic telephone dialing system was used. And it's important to look at, as the allegations in the complaint state, this is -- this is one of the most sophisticated technology companies in all of America that's created an application that can find a car nearby, give you pictures of the driver, give you the reviews, tell you how long it's going to get there, set you up with a ride, charge you, pay the driver, take a profit. And they've worked into their application this system that essentially extracts data from a user's telephone.

And then that -- there's absolutely no reason to doubt that it's plausible that this system has a sequential dialing capability in there that will be shown upon discovery. And

that's all we need, is that it has to be plausible. The definition is: Equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. We submit that no matter how those words are applied, it's plausible that any of those applications apply to the facts of this case in light of the intense and immense sophistication that we have in this system that's being deployed by Lyft.

Nevertheless, we're in the Ninth Circuit, and *Satterfield* does tell us that equipment that has the ability to use an electronic database to send text messages is equipment that has the capacity required by the statute. And, of course, the FCC has reached a similar conclusion. The reasoning about predictive dialers -- that term has been used quite a bit -- is not based upon predicting when the phone should ring. It's based upon the fact that computers, by their very nature, operate from a database. And by their very nature, they store the data in a list, and the processer sequentially processes one record at a time and goes through it.

THE COURT: Tell me how this is different than I see a coupon for Macy's, and I know my friend is looking for something, and I forward it on.

Isn't it the same thing as me hitting the "forward" button on my computer, and the message comes up on my friend's computer? Because this --

MR. HEYRICH: Yes.

THE COURT: You've got to have a contact here who says: Yes, I want you to contact Joe.

MR. HEYRICH: Right. Yes.

THE COURT: In other words, this -- this dialer doesn't scrub data from a participant's phone without somebody saying: Yes, you can have it.

MR. HEYRICH: It will not surprise the Court that we think there are significant differences.

For one, we believe that what the user, or the person who's in your scenario forwarding to a friend, the only thing in our -- in the Lyft situation that the user is doing is acquiescing to -- and the difference, too, is, Lyft is paying consideration to obtain that data. And the law has never been, and hopefully it never will be, that one can go out and purchase data and spam those people. Otherwise, it would be an end run around the TCPA, and machines would be causing intrusions into everyday life all over the place.

But the difference here is, in your scenario, that person with the coupon is sending that to a friend. Here, Lyft is taking the data. Lyft is processing the data. Lyft is organizing the data. Lyft even inserts the boilerplate promotional message. There's no indication that this "Jo Ann C." inserted any of the words that were in this promotional message. We think that's very important. There were screen

shots of the app, and it will be noticed that there's nowhere in there where it's suggested that you can send a personalized message.

So what we have is, really, it's an organized, wide-scale promotional campaign, where Lyft has said: Give us your data. We'll pay you. And then that -- those messages are processed through the pipes, the routers, the servers, and everything that Lyft has set up to automate this text messaging.

And under the law, it's not forwarding data that creates a claim, so it's not the user sending data to Lyft that creates a claim. It's Lyft making a telephone call. And we would submit that this really is the same thing as Lyft -- you know, in a different scenario, it could be a voice call where someone calls and says: Hey, your friend Jason thinks that you may want to use Lyft. Are you interested? I think any person would recognize that as run-of-the-mill telephone solicitation. And that's exactly what we're talking about here. We're talking about machine-based, processor-based intrusions into our private lives. And to allow this kind of system to exist, it's exactly what the TCPA was designed to prevent.

And that's really -- you know, the FCC has the experts in telephone technology. And really, the grounding of the FCC decisions is in looking at these technologies. And what they've said is, by their nature, those technologies have the capacity to store telephone numbers and to sequentially dial

telephone numbers.

But as I said, regardless of what definition the Court were to apply, under the Rule 12 standard, it certainly is plausible that this system has the capability to sequentially dial or to -- you know, 001, 002, whatever. And some of the courts have gotten into, you know, whether there needs -- whether it can be an ATDS if there's substantial modification and so forth. There are a lot of issues that really can't be decided without us having an opportunity for our expert to take a look at their system and to really see what it does.

And we would submit, too, that, you know, as a consumer protection statute, it's -- the Courts have said it is appropriate to construe these definitions broadly to protect consumers, rather than the other way around.

THE COURT: Well, what are we protecting from here? I mean, it's a -- if you decide you're going to carry around an iPhone, haven't you said, "Yeah, bother me"? Because the world can now bother you. You don't want to be bothered, you turn it off. But we get text messages all the time. And you don't have to open it up, and you don't have to respond.

So where is the harm?

MR. HEYRICH: Well, Congress has decided that it's an intrusion. It's an invasion of privacy. It makes our devices less useable, because we have to wade through the junk to get to the good stuff.

And if you look at -- if you look at e-mail spam, for example, where the law does not have the same teeth that the ATDS has, businesses across America spend millions and millions of dollars on spam filtering software so that when I sit down at my desk, I don't have 8,000 spam messages from, you know, someone who wants to send me money from Somalia or something. And that's really the harm. The only thing that's keeping our telephones free from that kind of incessant spam is this law. And Congress has decided that this is the same as limiting telemarketing calling late at night, or early in the morning, or calling over and over again with improper sales calls. We're in that same area.

So really we're -- technology is all around us. Technology is programmable, and technology is programmable to intrude into our lives at any given time. Sure, you can turn your phone off, but it's an important business tool that we all need, or we need to communicate with our kids, our family, you know, the office, whoever it is. So that's really the harm. It's keeping our telephones free of these unauthorized intrusions that Congress said are inappropriate.

So I think it's important -- again, on Rule 12, it has to be plausible. We've alleged, we believe, enough facts to get by Rule 12. And I am not aware of any case that says we don't. And it's not the transferring of data. It's Lyft that's actually making the call.

And finally, I guess the -- you know, the other important consideration here is that, you know, we're at the pleading stage. Of course, they're not going to let us look at their system until we have the Court's okay to do that. And it certainly seems to defy some fundamental due process rights for any plaintiff who could never ever allege facts to meet the definition in the TCPA with certainty without being able to look at what's there. And that's why I think the Rule 12 standard is so lenient.

We submit that it would be more appropriate for the Court to make an informed decision after we've had experts who can look at the system and analyze the equipment.

THE COURT: Well, surely you wouldn't have brought the lawsuit without doing an investigation that you believe that you have cause of action here.

MR. HEYRICH: That's correct. We do.

THE COURT: And I'm surprised. You must be one of the few lawyers that's ever argued to me that 12(b) is a liberal standard. *Twombly* is pretty strict, and has gotten more strict in terms of how much you have to plead in order to get through. More and more cases are bringing 12(b) in order to weed out those things that aren't really going to make it. So I'm a little surprised by your statement.

MR. HEYRICH: Well, in any TCPA case, a plaintiff -- sure, we can do a lot of investigating. We piece together a

lot of facts. We believe it is an automatic telephone dialing system. But, you know, we're not here on summary judgment, and we haven't had a chance to take depositions. We haven't had a chance to look at the system itself. And in this scenario, what the courts have said is, it just needs to be plausible that the defendants have used an automatic telephone dialing system.

THE COURT: Do I remember accurately that you filed your lawsuit four days after the message? Am I incorrect on that?

MR. HEYRICH: I don't recall the timeline, but I also -- I'm not certain. I'm sorry. I can't answer that.

I will say that we've been criticized in the past for waiting too long. Because if a defendant is sending large amounts of text messages, they prefer to know -- text messages that violate the law, they prefer to know sooner rather than later.

THE COURT: Thank you.

MR. HEYRICH: Unless the Court has more questions on ATDS, I'll turn to state law.

THE COURT: Go ahead.

MR. HEYRICH: So the question asked by the Court is: What does the word "subsection" mean in Section 19.190.090? And the answer to that, we submit, is clear from the context in that the subsection refers to the information that follows in

that subsection, in 090, which essentially is a section dealing with lawsuits for phishing; that is, someone who misrepresents who they are in order to get someone to click and give their account information, like if I pretend I'm Bank of America, give me your information quickly. But so that is -- if someone is seeking damages under 090 for a violation of 080, then those damages lie against the person who's engaged in phishing. But that in no way repeals or abrogates the damages that are available under Section 040. And those sections provide $500 in damages for a commercial electronic e-mail -- and that's a right that's existed since 1998 -- and for a commercial electronic text message, which is a right that's existed since 2003.

And I don't want to spend a lot of time going through the legislative history, but it is extremely important. And if it would assist the Court, I have a copy of the four session laws.

We've got a statute that's been affected by four separate enactments of the Washington state legislature. The first was the 1998 Electronic Mail Act. And that's where the state legislature called it an invasion of privacy and talked about the problem with this kind of spam is that it reduces the usability of one's own e-mail, because you have to wade through the unwanted messages to get to the ones that you actually want to use. And that statute created five sections, 010 through 050. And 040 is important, because that is the section that

establishes damages to the recipient of a commercial electronic mail message today.

In 2003, the legislature came along and added 060 and 070 and amended the definition of illegal conduct to include commercial electronic text messages. And the statute that we're talking about here, in 090, came along two years later in the E-mail Fraud Act. And what's interesting, if you look at the session laws, it will show you what the legislature changed. They added some words, they removed words, and they added 080 and 090 and the two follow-on sections about the importance to public policy and so forth.

They never touched 040. The legislature knew, since 1998, that that cause of action existed for electronic mail. They knew since 2003 the cause of action applied for commercial text messages. So it just makes no sense at all that in 090 -- that they come along in 2005, insert 090, and have somehow repealed or completely abrogated the rights that previously have existed. And the Washington courts certainly would not find that to be a direct repeal of those rights by implication. So to this day, 040 provides that: Damages to the recipient of a commercial electronic mail message or a commercial electronic text message sent in violation of this chapter are $500 or actual damages, whichever is greater.

So the statute has continued to provide for damages. To find now that there's no private cause of action would mean

that the legislature left in place a right without any remedy. And as the *Frias* case and the *O.S.T.* case recently has shown, the legislature -- the state courts do not find that the legislature will impliedly repeal rights that were well known and in existence. You know, if they wanted to get rid of it when they applied 090, they would have. But they left it in place. And there's no indication that the legislature intended to repeal it. And the Washington Supreme Court, in the *O.S.T.* case, as recently as two or three months ago, said that the Court should enforce any statute like this unless there's no conceivable way to harmonize and apply both of them.

And we submit -- you know, what's interesting is, one of the flaws, we think, in the reasoning is that the Defendant is relying on the second sentence of 090(1), which talks about subsection. But the first sentence of that talks about "a claimant may," may sue under 090. That doesn't mean that the plaintiff must sue under 090, because 040 is an alternative remedy that exists under the statute.

And what the courts in Washington also have said when interpreting Washington law is, in that kind of a situation, where you've got a general statute, like 090, that follows on a specific one, like 040, which applies to text messages and e-mail, that the four -- the preexisting statute continues to survive as an exception to the general rule. And that's one of the holdings in the *O.S.T.* case.

So to circle back to the Court's question here, we think what "subsection" means is that someone can sue under 190 for violation of the obligations in 080. But that does not mean that the clear language in Section 040 is meaningless and has been repealed.

Finally, it bears noting that these are important rights for Washington consumers, as reflected in the legislative intent in terms of what the legislature was concerned about. We submit that it's clear that 040 continues to survive and provide a claim. But if the Court has doubts, it certainly seems like an important enough issue where, you know, perhaps the Washington Supreme Court could be consulted on something like this, as the Court -- as Your Honor did in the *Frias* case not too long ago.

And I wasn't planning on addressing whether there was a promotion of goods or services for purposes of the state CEMA claim, as it was not among the list of questions. You know, but I guess I will say that Lyft is calling this an offer for something free. Historically for consumers, offers for things that are free often end up not really being so free. And in here, a consumer is required to give them a credit card, is required to agree on a long-term -- long, lengthy terms of service in order to sign up and use that. And frankly, you know, whether it was commercial and it was promotional, that's the kind of thing that we believe we should be entitled to

discovery. I suspect that they've earned quite a tidy profit from these promotional text messages that they sent out.

I guess, finally, I should address the FCC timing. And we've -- after receiving the Court's question, we did go back and review the request for comment and the petitions that the FCC has been considering. We haven't discerned any pattern that gives us any level of confidence as to when those would be decided. I would say that -- if ever, actually. There are a number that the FCC just never bothers to rule on at all.

And we would submit that if this case proceeds according to the normal course, on a typical time frame, by the time we're ready for dispositive motions or trial, the FCC either will have ruled or never will rule. And so from that standpoint, it doesn't seem wise to wait for the FCC in this situation.

With that, I'm happy to answer any additional questions, Your Honor.

THE COURT: Thank you, no.

MR. KELLER: Do we have any time left?

THE COURT: You've got about three minutes or so.

MR. KELLER: The definition of an automated dialer doesn't change whether it's a Rule 12 motion or a Rule 56 motion. Once you figure out what the definition is that you're going to use, you apply it in either context.

Counsel says is it plausible that an ATDS was used here.

There is no allegation in this complaint that we have automated, random, or sequential dialing. There's no allegation that it does that. He says: Well, what about capability? Maybe you could rejigger the system. Maybe you could send in an army of software engineers, or a sub-army, and get it to do that. I had my iPhone over there. I used it for the timer. You get enough software engineers, that thing is going to become an automated telephone dialing system. And, in fact, I think that's what Judge Lasnik ultimately concluded. That's why you can't look at, if you put all this work into it and reconfigure it, can you give it that capability in the future, as much as, what is it doing right now? How are you using it? In fact, that very issue is one of the issues that is teed up in both the TextMe case and the Glide Talk petitions in front of the FCC.

I want to just point out, if we were to stay this proceeding until mid-June, June 30 of next year, we would have a likelihood of having a resolution in TextMe, a likelihood of resolution in Glide Talk. There has also been an appeal that was filed to the Ninth Circuit from Judge Bashant's decision in *Marks vs. Crunch San Diego* which squarely deals with these issues.

THE COURT: They're not that fast, though.

MR. KELLER: They're not as fast as June 30. That's true.

And I got a little bit of a kick out of the supplemental authorities that Mr. Heyrich filed. I've never seen so many supplemental authorities. It just reinforced for me what a moving playing field we're dealing on here. If he can come up -- and we all could come up with so many potentially significant district court decisions just in the three months since the briefing period closed here. This is a really shifting playing field and one that if the Court is not inclined to dismiss the whole case, hopefully we would get a lot more guidance as to what some of these applicable rules are, if we were to stay this for a period of through June 30 and require the parties to report at that time.

Thank you, Your Honor.

THE COURT: Thank you.

Counsel, I'll write for you on this topic. But I normally have a turnaround time of about ten days, but I don't think I can make it. So if you don't see it by Friday, you're not going to see it until after the first of the year, the first week of January.

MR. KELLER: By Friday of next week?

THE COURT: Friday of next week; okay?

MR. KELLER: So if we don't see it by Friday, it will be after the first of year.

THE COURT: Actually, no. What I meant was, if you don't see it by this Friday, you won't see it until after the

first of the year.

MR. KELLER: Great.

MR. HEYRICH: Okay.

THE COURT: All right. Thank you very much for your arguments.

MR. HEYRICH: Thank you, Your Honor.

(Adjourned)

C E R T I F I C A T E

I, Andrea Ramirez, RPR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 2nd day of November, 2015.

/s/ *Andrea Ramirez*

Andrea Ramirez
Official Court Reporter